

R U L E M A K I N G R E Q U I R E M E N T S

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All State agencies are created by the Legislature in much the same manner as the Commission, with a host of enabling powers prescribed by statute. See, e.g., C.R.S. §25-7-104 through 110.8. Most, if not all, State agencies are authorized to adopt regulations to manage the programs they oversee. While their enabling powers authorize the adoption of regulations, the process by which such rules are adopted is prescribed in the Administrative Procedures Act, C.R.S. §§ 24-4-101, et seq. The Commission faces additional requirements above and beyond what is prescribed in the APA.

The Administrative Procedures Act

The Administrative Procedures Act establishes the procedural requirements for rulemaking by all state agencies.

- Twenty Days' Public Notice
 - Time, place and nature of rulemaking
 - Authority
 - Substance of proposal
 - Identification of any adoptions by reference
- Hearing, if deemed necessary
- Proposed Rule
- Statement of Basis, Authority and Purpose
- Statement of the Subject Matter
- Cost-Benefit Analysis
- Regulatory Analysis

The Air Pollution Prevention and Control Act

The APPCA has several special procedures that go above and beyond the Administrative Procedures Act.

- Sixty days' notice (Section 110)(1))
- Mail notice to all interested persons (Section 110(1))
- Hearing mandated (Section 110(1))
- Memorandum of Notice (Section 110.5)
- Economic Impact Statement (Section 110.5)
- Comparison with Federal law (Section 110.5(5))
- Range of alternatives (Section 110.5)
- 110.8 Determinations (Section 110.8)

Section 110.5(5) Findings

Pursuant to C.R.S. 25-7-110.5(5) (a) states:

Whenever the commission proposes any rule that exceeds the requirements of the federal act or differs from the federal act or rules thereunder, the commission shall make available in writing a copy of any such proposed rule and a detailed, footnoted explanation of the differences between the rule and the federal requirements.

These findings must include the following information:

- (I) Any federal requirements that are applicable to this situation with a commentary on those requirements;
- (II) Whether the applicable federal requirements are performance-based or technology-based and whether there is any flexibility in those requirements, and if not, why not;
- (III) Whether the applicable federal requirements specifically address the issues that are of concern to Colorado and whether data or information that would reasonably reflect Colorado's concern and situation was considered in the federal process that established the federal requirements;
- (IV) Whether the proposed requirement will improve the ability of the regulated community to comply in a more cost-effective way by clarifying confusing or potentially conflicting requirements (within or cross-media), increasing certainty, or preventing or reducing the need for costly retrofit to meet more stringent requirements later;
- (V) Whether there is a timing issue which might justify changing the time frame for implementation of federal requirements;
- (VI) Whether the proposed requirement will assist in establishing and maintaining a reasonable margin for accommodation of uncertainty and future growth;
- (VII) Whether the proposed requirement establishes or maintains reasonable equity in the requirements for various sources;
- (VIII) Whether others would face increased costs if a more stringent rule is not enacted;
- (IX) Whether the proposed requirement includes procedural, reporting, or monitoring requirements that are different from applicable federal requirements and, if so, why and what the "compelling reason" is for different procedural, reporting, or monitoring requirements;
- (X) Whether demonstrated technology is available to comply with the proposed requirement;
- (XI) Whether the proposed requirement will contribute to the prevention of pollution or address a potential problem and represent a more cost-effective environmental gain; and
- (XII) Whether an alternative rule, including a no-action alternative, would address the required standard.

Example of Section 110.5 Findings

The Commission adopted the following findings in the course of revising Regulation No. 7 to address nonattainment with the ground-level ozone standard on December 12, 2008:

(I) These rules are intended to reduce uncontrolled emissions of ozone precursor pollutants. The rules thereby serve to attain and maintain compliance with the National Ambient Air Quality Standard (NAAQS) for Ozone. However, there are no comparable federal requirements that apply to the sources in question.

(II) There are no applicable federal requirements, other than the duty to attain the ozone NAAQS. There is considerable flexibility in meeting the NAAQS. However, there are very limited sources of uncontrolled anthropogenic ozone precursor emissions to target in order to reduce ozone. Consequently, the sources in question, as a significant source of uncontrolled VOCs and NO_x, must be targeted in order to attain the standard.

(III) There are no applicable federal requirements, other than the duty to attain the ozone NAAQS. The ozone NAAQS was not determined taking into account concerns that are unique to Colorado.

(IV) These rules may prevent or reduce the need for costly retrofit to meet more stringent requirements at a later date. The DMA/NFR non-attainment area has violated the 0.08 ppm ozone NAAQS. Colorado will soon be required to comply with the new ozone NAAQS of 0.075 ppm. Colorado Governor Ritter has directed that Colorado air quality planning agencies implement measures to reduce ozone to a level below the NAAQS. If these rules are not adopted now, it may be necessary to require more costly retrofitting in order to meet the Governor's directive as well as the new NAAQS.

(V) Since there are no applicable federal requirements, there is no timing issue with regard to implementing federal requirements. However, these controls are intended to help the DMA/NFR attain the NAAQS. If the standard is not attained by the 2010 ozone season, the area may face a "moderate" non-attainment designation.

(VI) The adopted rules will assist in establishing and maintaining a reasonable margin for accommodation of uncertainty and future growth.

(VII) The adopted rules establish reasonable equity for sources subject to the rules by providing the same standards for similarly situated sources.

(VIII) If the state rules were not adopted, other sectors may face a disproportionate share of the burden of reducing precursor pollutants.

(IX) There are no corresponding federal requirements.

(X) Demonstrated technology is available to comply. Sources are already using the control devices intended to be used to comply with these rules. However, sources face an additional burden of implementing auto-igniters and surveillance. The Commission anticipates a reasonable degree of delay in securing and installing the technology in question and has accommodated the sources by providing for a reasonable delay for the application of these requirements.

(XI) The adopted rules will reduce VOC and NO_x emissions, thereby contributing to the prevention of the formation of ozone through the most cost-effective means available.

(XII) Alternative rules requiring additional controls for other sources would also provide gains toward attaining the ozone NAAQS. However, oil and gas industry members are the largest anthropogenic stationary source of precursor pollutants in the State. A disproportionate benefit to this industry would accrue if their uncontrolled emissions remain at current levels compared to other stationary sources.

(XIII) A no-action alternative may address the ozone NAAQS. Modeling and other analysis suggests that the NAA would attain the standard by 2010 without these rules. However, this analysis suggests that ambient levels of ozone would be very close to the NAAQS. These rules provide more assurance of attaining the ozone NAAQS while also providing for reductions that are necessary to make progress toward the new ozone NAAQS. No action would only delay the necessary reductions.

Section 110.8 Findings

In addition to the explanation prescribed in Section 110.5, the Commission must make the following findings pursuant to C.R.S. 25-7-110.8 if the proposed rule is intended to reduce air pollution and is not mandated by federal law:

(a) Any rule promulgated under section 25-7-110.5 is based on reasonably available, validated, reviewed, and sound scientific methodologies and that all validated, reviewed, and sound scientific methodologies and information made available by interested parties has been considered. Such review may include internal organizational review and not peer review.

(b) Evidence in the record supports the finding that the rule shall result in a demonstrable reduction in air pollution to be addressed by the rule unless such rule is administrative in nature;

(c) On and after July 1, 1997, and in conformance with guidance from the general assembly to incorporate the recommendations of the task force established in section 25-7-110.5 (6), evidence in the record supports the finding that the rule shall bring about reductions in risks to human health or the environment or provide other benefits that will justify the cost to government, the regulated community, and to the public to implement and comply with the rule;

(d) The commission shall choose an alternative that is the most cost-effective under the analysis required by section 25-7-110.5 (4), provides the regulated community flexibility, and which achieves the necessary reduction in air pollution. The commission may reject the most cost-effective alternative and shall provide findings of fact detailing why the most cost-effective alternative is unacceptable.

(e) The selection of the regulatory alternative by the commission will maximize the air quality benefits of regulation pursuant to this article in the most cost-effective manner. For purposes of the required analyses under this section, prior to the completion of the rule-making required pursuant to section 25-7-110.5, no benefit (except for air pollution reductions) can be attributed to regulating a facility already operating in compliance with a permit issued pursuant to applicable law.

Example of Section 110.8 Findings

The Commission adopted the following findings in the course of revising Regulation No. 7 to address nonattainment with the ground-level ozone standard on December 12, 2008:

(a) These rules are based upon reasonably available, validated, reviewed, and sound scientific methodologies, and the Commission has considered all information submitted by interested parties.

(b) Evidence in the record supports the finding that the rules shall result in a demonstrable reduction of ground-level ozone.

(c) Evidence in this record supports the finding that the rules shall bring about reductions in risks to human health and the environment that justify the costs to implement and comply with the rules.

(d) The rules are the most cost effective, provide the regulated community flexibility, and achieve any necessary reduction in air pollution.

(e) The selected regulatory alternative will maximize the air quality benefits of regulation in the most cost-effective manner.

Thoughts on 110.5/110.8 Findings

In my experience, the determinations and explanations required under Sections 110.5 and 110.8 are set forth in the Commission's Statement of Basis, Statutory Authority and Purpose. The Division, as staff to the Commission, prepares a proposed Statement so written. As a practical matter, I do not recall the Commission explicitly recognizing these explanations and determinations, per se. I believe the Commission instead simply votes on the proposal, as written, and potentially modified as a result of comment.

The Commission has not customarily included much detail specifically in support of these determinations. It is important that the record reflect the fact that the Commission considered these issues and affirmatively made the determinations, when appropriate. The Commission's Statement of Basis, Statutory Authority and purpose reflects the findings and determinations required under Sections 110.5 and 110.8, ensuring that the record reflects this fact.

Section 110.5 Economic Impact Analysis

CRS § 25-7-110.5(1)(c): Whenever the Commission proposes a rule, the tech secretary shall provide to the public upon request at cost, at the time notice is published, a proposed rulemaking packet including a statement describing the fiscal and economic impact of the proposed rule-

- **Initial EIA**
 - In writing
 - By proponent or division in coop with proponent
 - Made available to public at the time the request for hearing is heard
- **Final EIA**
 - In writing
 - Delivered to tech secretary and parties of record five days prior to prehearing conference
 - Ok to be late if
 - good cause shown
 - parties have had time to review
 - Based on reasonably available data
 - Data is not reasonably available if it is requested from industry and industry does not provide it
 - Failure to provide EIA will preclude such rule from being considered
 - Unless no reasonably available data
 - Don't include nonmarket costs or external costs notwithstanding compliance by a source
- **3 choices for analysis**
 - Cost-effectiveness analysis
 - Cumulative cost for affected business entity or industry
 - Direct costs to the public
 - Pollution reductions
 - Cost per unit of air pollution reductions
 - Cost for the division to implement
 - Industry studies
 - Characteristics and current econ conditions of business or sector
 - Projected impacts on growth of industry with and without implementation
 - How proposal may affect or alter the growth of that industry sector
 - Direct cost of the proposal on industry
 - EIA
 - Industry sectors impacted
 - Direct cost to primary affected business or sector
 - Estimate of impact on supporting business and sectors

Regulatory Analysis

The APA serves as the legal authority for this rule-making process,¹ and it sets forth requirements for both cost-benefit and regulatory analyses. Under the APA, the Department of Regulatory Agencies (“DORA”) may direct an agency engaged in a rule-making to conduct a cost-benefit analysis.² Any such request must occur at least twenty days prior to the hearing on the rules, and the cost benefit analysis must be submitted to DORA and made available to the public at least five days prior to the hearing.³ The cost benefit analysis must include a good faith description of the reason for the rule, the anticipated economic benefits and costs, any adverse effects on certain economic sectors and factors, and the costs and benefits of at least two alternatives.

¹ See C.R.S. § 24-4-101 *et. seq.*

² *Id.* at § 24-4-103(2.5)(a).

³ *Id.*

Also under the APA, any person may request an agency engaged in a rule-making to prepare a regulatory analysis. Any such request must occur at least fifteen days prior to the hearing on the rules, and the cost benefit analysis must be made available to the public at least five days prior to the hearing. The regulatory analysis must include a good faith discussion of the classes of persons who will be affected, the probable quantitative and qualitative impacts on such classes, the probable costs to the agency for implementation and enforcement, a comparison of the probable costs and benefits of the proposed rule to those of inaction, whether there are less costly or intrusive alternatives, and any alternatives. The analysis must include quantification of the data to the extent practicable and take account of both short-term and long-term consequences.⁴

So long as a cost benefit or regulatory analysis is undertaken in good faith it satisfies the APA.⁵ Elements include:

1. A description of the classes of persons who will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.
2. To the extent practicable, a description of the probable quantitative and qualitative impact of the proposed rule, economic or otherwise, upon affected classes of persons.
3. The probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.
4. A comparison of the probable costs and benefits of the proposed rule to the probable costs and benefits of inaction.
5. A determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.
6. A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule.
7. To the extent practicable, a quantification of the data used in the analysis; the analysis must take into account both short-term and long-term consequences.

APA Cost-Benefit Analysis

24-4-103(2.5)- EIA required ONLY if DORA Exec Dir. determines that rule will have negative economic impact on economic competitiveness or on small business and requests a cost-benefit analysis.

- ED must make the request at least twenty days prior to the hearing
- Analysis due at least 5 days prior to hearing
- Make available to public
- Submit to DORA Exec Director
- Failure to complete precludes the adoption of the rule
- CBA is sufficient if agency “has made a good faith effort to comply”, not if it is demonstrated to be insufficient or inaccurate.

⁴ *Id.* at § 24-4-103(4.5).

⁵ *Id.* at § 24-4-103(2.5)(d) & § 24-4-103(4.5)(d).

- **Content**

- Anticipated economic benefits
 - Growth/creation of new jobs/increased competitiveness
- Anticipated cost
 - Direct cost to government
 - Direct costs to business and other entities required to comply
 - Indirect costs to business and other entities required to comply
- Adverse effects on
 - Economy
 - Consumers
 - Private markets
 - Small businesses
 - Job creation
 - Economic competitiveness
- At least two alternatives to proposed rule
 - Include costs/benefit of pursuing each alternative.